PREVIOUS 1 1 EXIT

Last page of docket
SHDKT PROCEEDINGS AND ORDERS DATE: [06/01/92]

CASE NBR: [91101410] CFY STATUS: [DECIDED]
SHORT TITLE: [Waller, Samuel]
VERSUS [United States] DATE DOCKETED: [022592]
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~~~~~~~~DATE~~~~NOTE~~~~~~~~~~~~~~~~~~~~PROCEEDINGS & ORDERS~~~~~~~~~~~~~~~~~~~~~~

1	Feb 25 1992	D	Petition for writ of certiorari filed.
3	Mar 20 1992		Order extending time to file response to petition until April 24, 1992.
5	Apr 24 1992		Brief of respondent United States in opposition filed.
4	Apr 29 1992		DISTRIBUTED. May 15, 1992
6	May 4 1992	X	Reply brief of petitioner filed.
8	May 18 1992		REDISTRIBUTED. May 22, 1992
10	May 26 1992		REDISTRIBUTED. May 29, 1992
11	Jun 1 1992		Petition DENIED. Dissenting opinion by Justice White with whom Justice O'Connor joins. (Detached opinion.)

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91-1410

No. _____

IN THE SUPREME COURT OF THE

UNITED STATES

October Term, 1991

SAMUEL E. WALLER, Petitioner,

v.

UNITED STATES OF AMERICA, Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Does 28 U.S.C. § 455(a), which requires a judge to disqualify himself in any proceeding in which his partiality might reasonably be questioned, require that the cause of the apparent partiality or bias stem from an extrajudicial source?

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NO. _____

IN THE SUPREME COURT OF THE

UNITED STATES

October Term, 1991

SAMUEL E. WALLER, Petitioner,

v.

UNITED STATES OF AMERICA, Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Petitioner Samuel E. Waller prays that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Ninth Circuit entered on December 19, 1991, which affirmed the order of the United States District Court for the District of Oregon.

OPINION BELOW

The opinion of the Court of Appeals is not officially reported. It is reproduced as Appendix A, infra. On January 23, 1992, the Court of Appeals granted Petitioner's motion to stay the mandate pending disposition of his petition for writ of certiorari.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

STATUTORY PROVISIONS

28 U.S.C. §455(a) provides in relevant part:

> Any justice, judge, magistrate, or referee in bankruptcy of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

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STATEMENT OF THE CASE

The superseding indictment in this criminal case charged Petitioner and his stepfather, Gentry E. McKinney, with one count of conspiracy and sixty-one counts of "structuring" currency transactions to evade financial institution reporting requirements. See 18 U.S.C. § 371; 31 U.S.C. §§ 5313(a), 5322, 5324(3).

In January 1988 Mr. McKinney was an owner and manager of the Riverside Inn, a small resort located in Grants Pass, Oregon. Petitioner worked for McKinney, performing a variety of tasks including making bank deposits for McKinney and the Riverside Inn. Petitioner did not himself put the deposits together or otherwise determine how much to deposit. This was done by Mr. McKinney and bookkeepers at the Riverside Inn.

Petitioner was at all times acting under the direction and control of Mr. McKinney. During the period of January 12, 1988, through April 25, 1988, Petitioner and Mr. McKinney deposited a total of $1,975,201.41 into fourteen bank accounts. Of that amount, Petitioner deposited $448,817 in currency into accounts of Mr. McKinney and McKinney's businesses and into Petitioner's own account.

The government's theory was that Mr. McKinney was adding additional cash to the deposits for the Riverside Inn and was structuring the deposits so as not to trigger the filing of a currency transaction report ("CTR").[1] The

[1] By law, banks and other domestic financial institutions are required to complete CTRs on currency transactions exceeding $10,000. See 31 U.S.C. § 5313; 31 C.F.R. 103.22(a). A CTR is also known as IRS Form 4789.

government asserted that Petitioner assisted McKinney in making the cash deposits.

Petitioner and his stepfather, Mr. McKinney, were tried separately. Mr. McKinney had a jury trial in September 1989 and was convicted on all counts. He was sentenced on December 18, 1989. The Honorable James A. Redden, United States District Judge, District of Oregon, presided at the McKinney trial and imposed the sentence.

Petitioner's trial was severed from the McKinney trial on the agreement that Petitioner would waive a jury trial and proceed with a non-jury or bench trial before Judge Redden. Petitioner did formally waive a jury trial on October

12, 1989. His bench trial took place on April 13, 1990. Judge Redden found Petitioner guilty by written order dated June 28, 1990. Petitioner was sentenced by Judge Redden on January 7, 1991.

Prior to the January 7, 1991, sentencing, Petitioner received a copy of the Presentence Investigation Report ("PSR") prepared by the United States Probation Office. Attached to the PSR was a memorandum to the probation officer written by the government case agent, Internal Revenue Service Special Agent Roger Wirth ("Wirth Memorandum"). The Wirth Memorandum was dated October 24, 1989.

The Wirth Memorandum contained a great deal of prejudicial information and allegations about Petitioner. The Wirth Memorandum was offered to show

that Petitioner knew or reasonably should have known that the currency involved in the "structuring" transactions was "criminally derived property." This question bears on the application of the sentencing guidelines to a conviction under 31 U.S.C. § 5324(3). See United States Sentencing Guidelines ("U.S.S.G."), §§ 2S1.3(a)(1)(C) and (b)(1).[2]

The Wirth Memorandum claimed that Petitioner was tied to international drug smugglers who provided much of the currency deposited by him and his stepfather. Because a conviction for "structuring" under 31 U.S.C. § 5313 and

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[2] At sentencing the district court found that Petitioner did not in fact know that the currency was criminally derived, but did find that Petitioner should have known that it was criminally derived.

5324(3) does not require proof that the currency was from an illegal source, or knowledge of an illegal source,[3] the Wirth Memorandum disclosed to Petitioner for the first time the full scope of criminal activity in which the government suspected he and Mr. McKinney were involved.

Subsequent investigation disclosed that the Wirth Memorandum was utilized in connection with the prior sentencing of Mr. McKinney. Consequently, Petitioner learned that Judge Redden had received and read the Wirth Memorandum, with all its prejudicial allegations about Petitioner, prior to the time he

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[3] In contrast, 18 U.S.C. §§ 1956 and 1957 would require the government to prove that the currency was derived from an illegal source and that the defendant had knowledge that it was criminally derived.

presided as judge and jury at Petitioner's bench trial. Neither the government nor Judge Redden ever disclosed to Petitioner prior to his bench trial the existence of the Wirth Memorandum or the fact that Judge Redden had received it prior to the trial.

Prior to his scheduled sentencing, Petitioner filed a Motion for a New Trial. Petitioner asserted, inter alia, that Judge Redden should have disqualified himself from Petitioner's bench trial pursuant to 28 U.S.C. §455(a) because of the appearance of bias and partiality created by his prior receipt of the Wirth Memorandum and failure to disclose its existence to Petitioner prior to the bench trial.

At a hearing on November 5, 1990, Judge Redden stated that, although he

did not believe he was in fact biased against Petitioner because of the Wirth Memorandum, he did agree that the appearance of bias existed and was "aggravated" by the fact that Petitioner had proceeded with a bench trial. Transcript of Motions Hearing, November 5, 1990, at 39. Judge Redden indicated he believed that Petitioner would have been entitled to know that he had seen the Wirth Memorandum and what it said in deciding to waive a jury trial. Id.

Judge Redden denied Petitioner's Motion for a New Trial. He held that recusal was not required under 28 U.S.C. §455(a) because the prejudicial information about Petitioner (the Wirth Memorandum) was not received from an extrajudicial source, i.e., a source

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independent of the prosecution of Petitioner and Mr. McKinney.

On appeal, the Ninth Circuit held that "Information obtained by a judge through judicial duties in relation to one co-defendant. . .cannot serve to disqualify that judge from the subsequent trial of another co-defendant." App. at A-4 (citations omitted). In other words, the Court of Appeals adhered to the extrajudicial source requirement and held that the appearance of bias did not require Judge Redden to disqualify himself under § 455(a) because it was not derived from a source independent of the prosecution of Petitioner and Mr. McKinney.

REASON FOR GRANTING THE WRIT

This Court should grant the writ because there is a conflict between the

Ninth Circuit and the First Circuit on the question of whether an extrajudicial source requirement applies to disqualification under § 455(a). To understand what the conflict involves, the Court must review the disqualification statute, 28 U.S.C. § 455. This statute provides in relevant part:

> (a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.
>
> (b) He shall also disqualify himself in the following circumstances:
>
> > (1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

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The courts apply different standards of proof to subsections (a) and (b) in determining whether disqualification under § 455 is required.

Section 455(a) requires disqualification in any proceeding in which the judge's impartiality "might reasonably be questioned." In the Ninth Circuit, the test for disqualification under this subsection is,

> [W]hether or not given all the facts of the case there are reasonable grounds for finding that the judge could not try the case fairly either because of the appearance or the fact of bias or prejudice.

United States v. Conforte, 624 F.2d 869, 881 (9th Cir.), cert. denied, 449 U.S. 1012 (1980). This standard is an objective standard requiring disqualification "if there is a

reasonable factual basis for doubting the judge's impartiality." Id., quoting, H. Rep. No. 1453, 93rd Cong., 2d Sess., reprinted in [1974] U.S. Code Cong. & Admin. News 6351, 6354.

On the other hand, disqualification under § 455(b) is not based on an objective standard but requires a showing of actual bias in fact. On this point the circuits seem to be in agreement. See United States v. Chantal, 902 F.2d 1018, 1023 (1st Cir. 1990), and United States v. Conforte, 457 F.Supp. 641, 657 (D. Nev. 1978), aff'd 624 F.2d 869 (9th Cir), cert. denied, 449 U.S. 1012 (1980). Also, the courts are in agreement that the "bias in fact" standard of § 455(b) requires that the source of bias be extrajudicial. See Id.

The conflict is whether disqualification under the objective standard of § 455(a) must be predicated on an extrajudicial source. In the First Circuit the answer to this question is a resounding "No." In Chantal, the First Circuit addressed this question head-on and affirmed its earlier decisions, holding that "[T]he source of the asserted bias/prejudice in a § 455(a) claim can originate explicitly in judicial proceedings." 902 F.2d at 1022. The position of the First Circuit is based on its interpretation of legislative revisions to § 455 that were enacted in 1974. See Act of Dec. 5, 1974, Pub. L. No. 93-512, § 1, 88 Stat. 1609. Prior to this amendment, § 455 required disqualification if the judge "in his

opinion" deemed it improper to sit in a particular case. The court in Chantal noted the legislative shift from a subjective standard to an objective one.

> We recognize that the newly amended recusal provision, 28 U.S.C. § 455(a), now permits disqualification of judges even if alleged prejudice is a result of judicially acquired information in contradistinction to the prior law that required a judge to hear a case unless he had developed preconceptions by means of extrajudicial sources.

Chantal, 902 F.2d at 1022, quoting, United States v. Cepeda Penes, 577 F.2d 754, 758 (1st Cir. 1978) (emphasis in original).

The Chantal court acknowledged its conflict with the Ninth and Fifth Circuits. 902 F.2d at 1021-1022. It aligned itself with decisions of the Sixth Circuit. Id. at 1024. See

Roberts v. Bailar, 625 F.2d 125, 127-129 (6th Cir. 1980).

The Ninth Circuit panel below was presented with the First Circuit authorities cited above and expressly declined to follow them. Rather, the panel stated that, "Information obtained by a judge through judicial duties in relation to one co-defendant, however, cannot serve to disqualify that judge from the subsequent trial of another co-defendant." App. A-4. The court's adherence to the extrajudicial source rule was grounded in earlier decisions of the Ninth Circuit. See United States v. Monaco, 852 F.2d 1143, 1147 (9th Cir. 1988), cert. denied, 488 U.S. 1040 (1989), and United States v. Winston, 613 F.2d 221, 223 (9th Cir. 1980). As regards the conflicting First Circuit

position set forth in Chantal, the Ninth Circuit panel stated only, "We have not followed the First Circuit's position on this issue." App. at A-5.

The Ninth Circuit's position has been criticized by the commentators who agree with the First Circuit that a rigid test based on the source of alleged bias is not consistent with the 1974 amendment of § 455, wherein the subjective standard was abandoned in favor of an objective one. It has been suggested that the real focus should remain fixed on whether a reasonable person would question the judge's impartiality, regardless of the source of the alleged bias. See, Comment, Questioning the Impartiality of Judges: Disqualifying Federal District Court

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Judges Under 28 U.S.C. § 455(a), Temple L.Q. 697, 717 (1986).

Because of the conflict between the Courts of Appeals on the applicability of the extrajudicial source requirement to disqualification under § 455(a), this case merits review by this Court.

CONCLUSION

For the reasons stated, the writ should be granted and the judgment of the Court of Appeals for the Ninth Circuit reversed.

DATED this 19th day of February, 1992.

Respectfully submitted,

NORMAN SEPENUK, P.C.

_____

Norman Sepenuk
Douglas Stringer
Of Attorneys for Petitioner

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. SAMUEL WALLER, Defendant-Appellant.	NO. 91-30041 DC NO. CR-89-60021-2-JAR MEMORANDUM* F I L E D 12/19/91 Clerk, U.S. Court of Appeals

Appeal from the United States District Court for the District of Oregon
James A. Redden, District Judge, Presiding

Argued and Submitted November 4, 1991
Portland, Oregon

BEFORE: TANG, O'SCANNLAIN, and RYMER, Circuit Judges.

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

Samuel Waller was found guilty of structuring approximately $500,000 in currency deposits with various banks in Oregon, in individual deposit amounts of less than $10,000, so as to avoid federal currency transaction report (CTR) requirements. 31 U.S.C. § 5513(a), 5322, and 5324(3). Waller appeals the district court's denial of his motion for a new trial. He argues that Judge Redden should have recused himself after reviewing an FBI report (the Wirth Memorandum) appended to co-defendant Gentry McKinney's presentence report, which contained information about drug trafficking that implicated Waller as well as McKinney. Waller also claims that his waiver of a jury trial was not "knowing and intelligent" because he did not know the judge was

familiar with the Wirth Memorandum. Waller additionally argues that his rights under Miranda v. Arizona, 384 U.S. 436, 478-79 (1966), were violated when a prosecution witness testified about Waller's demeanor during a custodial interrogation. Finally, Waller contends that U.S.S.G. § 2S1.3(a)(1)(C)[1] is an unconstitutionally vague guideline and, in any event, was applied erroneously in his case. We affirm.

I.

The denial of a motion for a new trial is reviewed for abuse of discretion, United States v. Steel, 759 F.2d 706, 713 (9th Cir. 1985), as is

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[1] Waller was sentenced in January 1991 and thus the district court applied U.S.S.G. § 2S1.3(a)(1)(C) as it appears in the November 1990 Guidelines Manual.

Judge Redden's refusal to recuse himself. United States v. Monaco, 852 F.2d 1143, 1147 (9th Cir. 1988), cert. denied, 488 U.S. 1040 (1989). Waller argues that Judge Redden's review of the FBI report during the McKinney sentencing process compromised the appearance of impartiality during Waller's subsequent bench trial. Information obtained by a judge through judicial duties in relation to one co-defendant, however, cannot serve to disqualify that judge from the subsequent trial of another co-defendant. See Id.; United States v. Winston, 613 F.2d 221, 223 ((9th Cir. 1980). Waller relies on a First Circuit opinion, United States v. Chantal, 902 F.2d 1018 (1st Cir. 1990), to support his contention that an impermissible

appearance of judicial bias can originate even when a judge is performing judicial duties. We have not followed the First Circuit's position on this issue.

Our adherence to Monaco is supported by the fact that, as Judge Redden noted in his written order denying the motion for a new trial, he read the FBI report more than five months prior to Waller's bench trial and had by that time already forgotten its significance and specific allegations. Furthermore, judges are presumed to have ignored inadmissible evidence when deciding a case. Harris v. Rivera, 454 U.S. 339, 346 (1981) (per curiam). This presumption applies with equal force when a judge reviews a report during the sentencing process in one case that

would be inadmissible in another case over which he subsequently presides. Finally, because all parties agreed that evidence in McKinney's trial could be considered in Waller's trial, and were aware that Judge Redden would have access to all information proffered in the McKinney proceedings, the Wirth Memorandum submitted in connection with McKinney's sentence was not an ex parte communication that the judge should not have seen. Cf. United States v. Van Griffin, 874 F.2d 634, 637 ((9th Cir. 1989) (magistrate had police report about defendant he should not have had).

Given these facts, we see no reasonable grounds for questioning Judge Redden's impartiality because of bias or prejudice. See United States v. Conforte, 624 F.2d 869, 881 (9th Cir.),

cert. denied, 449 U.S. 1012 (1980). Accordingly, Judge Redden did not abuse his discretion by declining to recuse himself, or by denying the motion for new trial.

II.

Waller's other ground for seeking a new trial is based upon a claim that his jury waiver was invalid. Waller waived his right to a jury on two occasions: once in June 1989 when the parties stipulated that Waller's bench trial would follow McKinney's jury trial, and that evidence in the McKinney trial could be considered in Waller's; and again in April 1990 immediately before the start of Waller's trial. He argues that the judge failed to make the kind of disclosure required for an intelligent waiver, and that the

disclosure fell short of what Conforte condoned.

No problem arises from the original waiver because the Wirth Memorandum had not yet surfaced. So far as the second waiver is concerned, it was well within Judge Redden's discretion to find that there was no information of which he was then aware that should have been disclosed. See Conforte, 624 F.2d at 881-82. Waller knew that Judge Redden would know whatever came up during the McKinney trial. Having attended that trial, Waller knew that the government had proffered evidence that a narcotics sniffing dog had reacted positively to currency deposited by McKinney. Even though that evidence was excluded from McKinney's jury trial, Judge Redden obviously knew about it, and Waller knew

Judge Redden knew about it. Similarly, Waller knew that the government's theory was that drug trafficking was the source of the funds he and McKinney deposited. He had been asked about drug trafficking shortly after his arrest, and during discovery the government provided Waller with alleged drug records found in his car. These records were the subject of a motion in limine and he therefore knew that Judge Redden was aware of the government's belief that Waller was involved in dealing drugs. While the Wirth Memorandum may have been more detailed, even had Judge Redden recalled it, it did not refer to any subject not already touched upon. Waller, therefore, was sufficiently informed of Judge Redden's knowledge of his

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involvement with drugs that his waiver was knowing and intelligent.

Under the circumstances of this case, it was unnecessary for the trial judge to go further, as Waller urges he should have, and specifically warn him that a juror with Judge Redden's knowledge would be disqualified. We conclude the waiver was valid, and that the district court did not abuse its discretion in denying Waller's motion for a new trial.

III.

Whether Agent Bruckner's testimony violated Waller's Fifth Amendment Miranda rights presents a question of law reviewed de novo. See United States v. Schuler, 813 F.2d 978, 980 (9th Cir. 1987). Waller claims Bruckner's testimony violates the rule that the

prosecution may not comment on a defendant's silence after he has been informed of his right to remain silent. See Wainwright v. Greenfield, 474 U.S. 284, 290-91 (1986); Doyle v. Ohio, 426 U.S. 610, 617-18 (1976). Unlike those two cases, however, Waller was not, in fact, silent after receiving his Miranda warnings. He responded to Agent Bruckner's custodial questioning. Waller's Fifth Amendment right to remain silent, therefore, was not violated. Cf. Anderson v. Charles, 447 U.S. 404, 408-09 (1980).

IV.

Waller contends that U.S.S.G. § 2S1.3(a)(1)(C) is unconstitutionally vague because it provides a sentence enhancement for individuals who "reasonably should have believed that

the funds were criminally derived property." Assuming that sentencing guidelines can be challenged on their face as unconstitutionally vague, we do not think § 2S1.3(a)(1)(C) violates due process. In United States v. Helmy, No. 89-10659, slip op. 14657, 14665-66 (9th Cir. Oct. 28, 1991), we indicated that a guideline satisfies due process if it "provide[s] explicit standards for those who apply it[,] to prevent arbitrary and discriminatory enforcement." Id. at 14666 (citing Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 498 (1982)).

The reasonable person standard found in § 2S1.3(a)(1)(C) means that judges may not apply that section's upward enhancement arbitrarily and discriminatorily--they must first make

an objective determination that the defendant should have known the property was criminally derived property. Because judges are capable of making a reasoned judgment that an individual in a particular case should know when a horde of cash is criminally derived property, we conclude that § 2S1.3(a)(1)(C) does not authorize arbitrary sentence enhancements, and thus does not offend due process.

Finally, Waller contends there is insufficient evidence in the record to support the conclusion that he reasonably should have known that the cash he deposited was criminally derived property. Waller's claim fails. First, the sheer volume of cash he handled in a three-month period undoubtedly would have led a reasonable person to consider

it criminally derived property. Second, testimony from Agent Bruckner suggested that Waller was aware the money had been obtained from drug sales. Finally, Waller's counsel once again brought the drug allegations raised in the Wirth Memorandum to the district court's attention prior to Waller's sentencing.[2] That memcrandum also suggests Waller knew the cash had been obtained through drug trafficking.

AFFIRMED.

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[2] Waller's counsel wrote a letter to Judge Redden prior to his sentencing that attempted to rebut the Wirth Memorandum's allegations.

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing PETITION FOR A WRIT OF CERTIORARI on counsel for respondent by mailing three copies thereof to said counsel in a sealed envelope with postage paid, addressed to:

Solicitor General of the
United States
Department of Justice
Washington, D. C. 20530

and one copy addressed to:

James L. Sutherland
Assistant U. S. Attorney
701 High Street
Eugene, Oregon 97401-2713

and deposited in the United States Post Office at Portland, Oregon, on said day. All parties required to be served have been served.

DATED this 19th day of February, 1992.

Norman Sepenuk
Of Attorneys for Petitioner

No. 91-1410

In the Supreme Court of the United States

OCTOBER TERM, 1991

SAMUEL E. WALLER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district judge abused his discretion by not disqualifying himself under 28 U.S.C. 455(a), which requires disqualification when a judge's impartiality might reasonably be questioned.

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OCTOBER TERM, 1991

No. 91-1410

SAMUEL E. WALLER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A14) is unpublished, but the judgment is noted at 951 F.2d 364 (Table).

JURISDICTION

The judgment of the court of appeals was entered on December 19, 1991. The petition for a writ of certiorari was filed on February 25, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a bench trial in the United States District Court for the District of Oregon, petitioner was convicted on 61 counts of structuring deposits to avoid

currency transaction reporting requirements, in violation of 31 U.S.C. 5313(a), 5324(3) and 5322, and one count of conspiring to commit those offenses, in violation of 18 U.S.C. 371. He was sentenced to 15 months in prison, to be followed by two years of supervised release. C.A. Excerpts of Record 116-118. The court of appeals affirmed. Pet. App. A1-A14.

1. Under 31 U.S.C. 5313(a) and implementing regulations, 31 C.F.R. 103.22, a domestic financial institution is required to file a currency transaction report with the Internal Revenue Service for each currency transaction that exceeds $10,000. The evidence at trial, the sufficiency of which is not in dispute, showed that between January 12, 1988, and April 25, 1988, petitioner deposited over $400,000 in 80 currency transactions, each one of which involved less than $10,000. He deposited the currency into the business and personal accounts of his co-defendant and stepfather, Gentry McKinney, as well as into his own account. Gov't C.A. Br. 12-13; Pet. 4. In so doing, petitioner structured the transactions to avoid federal reporting requirements. For example, he was involved in a scheme to add cash to McKinney's business deposits and spread some deposits over Friday, Saturday, and Sunday instead of making a large single deposit. Gov't C.A. Br. 12-14.[1]

2. The district court granted petitioner's motion to sever his trial from that of McKinney. In connection with that motion, petitioner and the government agreed that McKinney would be tried by a jury prior to petitioner's trial. Petitioner agreed to waive his

[1] The evidence also showed that petitioner structured transactions relating to his purchase of a home and to other deposits into McKinney's and his own bank accounts. Gov't C.A. Br. 18-21.

right to a jury trial and to have a bench trial using the relevant evidence from McKinney's trial, as supplemented by any evidence adduced relative to petitioner's role in the offense. C.A. Excerpts of Record 104.

The same district judge presided at both trials. After McKinney's conviction, the judge saw an FBI report that had been appended to McKinney's presentence report. The FBI report alleged that McKinney and petitioner had been involved in drug trafficking. C.A. Excerpts of Record 105-106. Based on the trial judge's review of the FBI report during McKinney's sentencing, petitioner moved for a new trial in his case. He alleged that the judge should have recused himself from this case because "his impartiality might reasonably be questioned," 28 U.S.C. 455(a), on account of his contact with the information in that report. C.A. Excerpts of Record 109.

The district court denied petitioner's motion. The judge acknowledged that he had read the FBI report alleging drug dealing by McKinney and Waller, but stated that he had disregarded references to Waller when he sentenced McKinney. C.A. Excerpts of Record 106-108. Moreover, while the judge was aware of the government's general contentions concerning the drug-related source of the currency at issue, he explained that he had either rejected or failed to recall specific allegations from the McKinney presentence report. *Id.* at 109. The court concluded that a new trial was unwarranted because (a) petitioner knew that the court had information concerning the government's "drug source" theory but did not move for recusal at the outset of the case; (b) the court did not harbor any bias or prejudice toward petitioner; and (c) the court ignored any inadmissible evidence in adjudicating petitioner's guilt. *Id.* at 110.

3. The court of appeals affirmed, reasoning that "[i]nformation obtained by a judge through judicial duties in relation to one co-defendant[] * * * cannot serve to disqualify that judge from the subsequent trial of another co-defendant." Pet. App. A4. Several factors supported the court's conclusion. First, the trial judge had read the McKinney presentence report more than five months before petitioner's bench trial and had forgotten the significance and the specific allegations of the report. *Id.* at A5. Second, a judge is presumed to ignore inadmissible evidence in deciding a case, and that presumption applied with respect to the trial judge's consideration of the McKinney presentence report. Third, because petitioner had agreed that the trial judge could consider evidence from McKinney's trial in petitioner's trial, he was aware that the judge would have access to all information from those proceedings. Thus, the FBI report in the McKinney case was not an ex parte communication that the trial judge should not have seen. *Id.* at A5-A6.

ARGUMENT

Petitioner contends that the district judge should have recused himself under 28 U.S.C. 455(a) because of his awareness of the allegations in the McKinney presentence report. Pet. 11-19. He principally contends, Pet. 15-18, that the decision below conflicts with *United States* v. *Chantal*, 902 F.2d 1018 (1st Cir. 1990), which held that a judge's acquisition of information in a prior case can be grounds for recusal under Section 455(a) if the judge's statements or actions would lead a reasonable person to question his impartiality. 902 F.2d at 1022-1024. Although *Chantal* differs in approach from the unpublished opinion in

this case,[2] see Pet. App. A5, there is no conflict between the two decisions.[3]

The judge in *Chantal* had said, during the sentencing phase of a previous prosecution, that he believed that Chantal was "an unreconstructed drug trafficker" and that the judge had "no confidence whatever that [Chantal] will change his ways in the future." 902 F.2d at 1020. When Chantal was again indicted and the case was assigned to the same judge, Chantal moved to recuse him under Section 455(a), citing the judge's remarks in the previous case. The judge denied that motion, reasoning that his prior comments arose from a judicial rather than extrajudicial source. Concluding that an appearance of bias

[2] Consistent with the decision below, other courts of appeals have held that a motion for recusal under Section 455(a) must be based on circumstances that are extrajudicial in origin. See, *e.g.*, *United States* v. *Sammons*, 918 F.2d 592, 599 (6th Cir. 1990); *McWhorter* v. *City of Birmingham*, 906 F.2d 674, 678 (11th Cir. 1990); *United States* v. *Mitchell*, 886 F.2d 667, 671 (4th Cir. 1989); *United States* v. *Merkt*, 794 F.2d 950, 960 (5th Cir. 1986), cert. denied, 480 U.S. 946 (1987). Although some courts have recognized an exception to that general rule when the moving party demonstrates pervasive bias and prejudice, *e.g.*, *McWhorter*, 906 F.2d at 678, petitioner does not allege, and there is no basis for finding, such circumstances in this case.

[3] Relying on *Roberts* v. *Bailar*, 625 F.2d 125 (6th Cir. 1980), petitioner also suggests, Pet. 16-17, that the Sixth Circuit has taken an approach that is contrary to that of the Ninth Circuit. *Bailar*, however, merely held that recusal was proper after the judge said of a defendant in a sex discrimination action, "I know [the defendant] and he is an honorable man and I know he would never intentionally discriminate against anybody." 625 F.2d at 127. The decision in *Bailar* did not address the issue presented here, and the Sixth Circuit has since made clear that a motion for recusal must be based on extrajudicial circumstances. See *Sammons*, 918 F.2d at 599.

could in some circumstances arise out of judicial proceedings, the First Circuit reversed and remanded for reconsideration of whether the trial judge's impartiality could reasonably have been questioned. 902 F.2d at 1024.

Here, by contrast, the district judge's impartiality could not reasonably be questioned, even taking into account the McKinney presentence report.[4] Unlike the judge in *Chantal*, the judge here made no remarks in petitioner's or McKinney's case that would indicate a lack of impartiality toward petitioner. Indeed, the trial judge made clear that he had disregarded allegations about petitioner in considering McKinney's presentence report and that he had either rejected or forgotten the report's specific allegations by the time of petitioner's trial five months later.[5] Finally, there is nothing in the record to rebut the presumption that the judge considered only admissible evidence in adjudicating this case or to indicate that the court was impermissibly influenced by the McKinney presentence report in finding petitioner

[4] It is well settled, and petitioner does not dispute, that a motion to recuse under Section 455(a) is to be decided by asking whether a reasonable person, after viewing all the circumstances, would question the judge's impartiality. *E.g.*, *United States* v. *Walker*, 920 F.2d 513, 517 (8th Cir. 1990); *Sammons*, 918 F.2d at 599; *McWhorter*, 906 F.2d at 678; *Chantal*, 902 F.2d at 1024.

[5] The judge was aware of the general contention that the source of the currency at issue was illegal narcotics. However, petitioner knew that the judge had learned of that theory at McKinney's sentencing and did not move for recusal at the outset of the trial. In addition, the government proffered admissible evidence advancing the "drug source" theory in petitioner's case. Thus, the court would have learned of that theory in any case.

guilty.[6] Thus, even under the reasoning of *Chantal*, the district court acted well within its discretion in rejecting petitioner's motion for a new trial, and the court of appeals properly held that, on the facts of this case, there are "no reasonable grounds for questioning [the trial judge's] impartiality."[7] Pet. App. A6.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 1992

[6] Indeed, in his brief before the court of appeals, petitioner specifically disavowed that the trial judge harbored actual bias against him. See Pet. C.A. Br. 9 n.7 ("We have not asserted below, nor do we assert here, that Judge Redden was in fact biased against Defendant * * *.").

[7] In a case decided after *Chantal*, the First Circuit rejected a claim analogous to petitioner's. In *United States* v. *Devin*, 918 F.2d 280 (1990), the defendant alleged that his trial judge was biased against him because of the court's participation in a similar and related case. The First Circuit observed that "[t]he fact that Devin's case was reminiscent of a case over which the judge had recently presided was not a disqualifying factor," even though the trial judge referred to certain of his rulings in the previous case in Devin's trial. *Id.* at 294. The court of appeals also held that Devin had erroneously relied on *Chantal* because the judge in Devin's case had not made any "regrettable" remarks about Devin in a prior trial. *Id.* at 295 n.12.

(3)

No. 91-1410

IN THE SUPREME COURT OF THE

UNITED STATES

October Term, 1991

SAMUEL E. WALLER, Petitioner,

v.

UNITED STATES OF AMERICA, Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITIONER'S REPLY TO BRIEF FOR THE UNITED STATES IN OPPOSITION

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ARGUMENT

1. We take exception to the government's claim that "there is no conflict" between the Court of Appeals' decision below and the First Circuit opinion in United States v. Chantal, 902 F.2d 1018 (1st Cir. 1990). See Gov't Opp. 4-5. The district court and the

Court of Appeals in this case specifically held that the district judge was not required to recuse himself because the alleged source of bias, the Wirth Memorandum, was not extra-judicial.[1] The district court stated: "The information was not extra-judicial, but was knowledge obtained in the course of my earlier participation in what must be considered the same case. This does not require recusal." C.A. Excerpts of Record 111. The Court of Appeals held that "information obtained by a judge through judicial duties in relation to one co-defendant, however, cannot serve

[1] The government erroneously characterizes the Wirth Memorandum as an FBI report. The memorandum was written by an IRS Special Agent after Mr. McKinney was convicted. It was written specifically for Mr. McKinney's probation officer for inclusion in McKinney's presentence report.

to disqualify that judge from the subsequent trial of another co-defendant." Pet. App. A-4. The First Circuit in Chantal, on the other hand, expressly considered and rejected the Ninth Circuit's adherence to the extra-judicial source requirement. 902 F.2d at 1021-1022. The Chantal court stated: "The First Circuit, however, has repeatedly subscribed to what all commentators characterize as the correct view that. . .the source of the asserted bias/prejudice in a § 455(a) claim can originate explicitly in judicial proceedings." 902 F.2d at 1022.

Petitioner relied on Chantal in the Court of Appeals. The Ninth Circuit expressly refused to follow Chantal. "Waller relies on a First Circuit opinion [Chantal] to support his

contention that an impermissible appearance of judicial bias can originate even when a judge is performing judicial duties. We have not followed the First Circuit's position on this issue." Pet. App. 4-5. We fail to see why the government cannot concede the obvious existence of a conflict among the circuits on this important question when the circuits themselves have acknowledged that the conflict exists.

2. The parties and the courts are all in agreement that the question of recusal under 28 U.S.C. § 455(a) is governed by an objective, reasonable-person standard. See Gov't Opp. 6 n.4. The problem is that after paying lip service to the objective standard embodied in § 455(a), the government, as

well as the district court and Court of Appeals, has claimed that recusal was not required in this case on subjective grounds, such as the district court's claim that he had forgotten the significance and the allegations contained in the Wirth Memorandum, and that he was not in fact biased against Petitioner as a result of the Memorandum. See Gov't Opp. 4; Pet. App. A-5; C.A. Excerpts of Records 114 ("I conclude that I was impartial because I know that I was not affected by the inadmissible and irrelevant speculation contained in the memorandum.")

However, as to objective bias, the record completely rebuts the government's groundless claim that "the district judge's impartiality could not reasonably be questioned. . . ." Gov't

Opp. 6. In fact, the district court itself acknowledged that the appearance of partiality was created by his receipt of the Wirth Memorandum. See Transcript of Motions Hearings, November 5, 1990, at 39 (". . .but I do believe that the appearance of the question exists, and I think it is aggravated here by the fact I allowed a waiver of the jury.") There can be no dispute but that a potential juror who had received and reviewed the extremely prejudicial allegations contained in the Wirth Memorandum would have been immediately disqualified from serving as a juror at Petitioner's trial.[2] The appearance of bias and

[2] Special Agent Wirth's Memorandum alleged that most of the currency deposited by Mr. McKinney and Petitioner was derived from international drug smuggling activities of other individuals, Hartog, Southard, and

partiality, conceded by the district court to exist, was greatly magnified by virtue of the fact that the district court acted as the jury in this bench trial. Petitioner acknowledges that a trial judge is presumed to disregard inadmissible evidence in deciding a case. Gov't Opp. 4. That does not change the fact that a reasonable person would question the impartiality of a judge who received prejudicial information unbeknownst to a litigant,

Levine. "[I]t is very evident that [] McKinney and Waller have been closely associated with Daniel Den Hartog, Jack Southard, and possibly Edward Levine, among others, since at least December 1985. It is also evident that these associates of McKinney and Waller have been deriving substantial profits, consisting of massive quantities of U. S. currency, from the illegal importation and distribution of Thai marijuana over at least the past four or five years, and possibly much longer." Wirth Memorandum at 13.

failed to inform the litigant of it, and then presided over the litigant's bench trial.

3. Petitioner does not dispute the government's claim that the Ninth Circuit and other circuits continue to look to an extra-judicial source of bias in determining whether recusal is required under § 455(a). See Gov't Opp. 5 n.2. Continued adherence of the Ninth Circuit and other circuits to the extra-judicial source requirement is contrary to legislative intent. In 1974 Congress amended § 455, enacting the current objective standard governing recusal. This replaced the old subjective standard in which a court had a duty to sit and was only required to recuse itself if "in his opinion" the judge deemed it improper to sit in a

particular case. See Chantal, 902 F.2d at 1022-1024. The extra-judicial source requirement is a relic of the outdated subjective standard. The Ninth Circuit and other circuits relied on by the government inexplicably continue to blindly adhere to this requirement even in the face of the clearly expressed legislative intent underpinning § 455(a) and the objective standard that it embodies. This is the reason for the conflict with Chantal.

4. The government claims that Petitioner knew the details of the government's drug theory because of Mr. McKinney's sentencing and should have moved for recusal at the outset of Petitioner's trial. Gov't Opp. 6 n.5. That is wrong. Presentence reports are confidential. Petitioner did not have

access to Mr. McKinney's Presentence Report (and the Wirth Memorandum attached to it) at the time of McKinney's sentencing. Petitioner did not obtain the McKinney Presentence Report until after his own bench trial and prior to his own sentencing when he filed a motion for disclosure of McKinney's Presentence Report. The evidence proffered by the government at the trial of McKinney and Petitioner as to drug source was not nearly so prejudicial as the undisclosed allegations contained in the Wirth Memorandum. See Pet. C.A. Br. 24-26.

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CONCLUSION

For the reasons stated herein, the Petition for a Writ of Certiorari should be granted.

DATED this 4/13 day of May, 1992.

Respectfully submitted,

NORMAN SEPENUK, P.C.

S/

Norman Sepenuk
Douglas Stringer
Attorneys for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing PETITIONER'S REPLY TO BRIEF FOR THE UNITED STATES IN OPPOSITION on counsel for respondent by mailing three copies thereof to said counsel in a sealed envelope with postage paid, addressed to:

Solicitor General of the
United States
Department of Justice
Washington, D. C. 20530

and one copy addressed to:

James L. Sutherland
Assistant U. S. Attorney
701 High Street
Eugene, Oregon 97401-2713

and deposited in the United States Post Office at Portland, Oregon, on said day. All parties required to be served have been served.

DATED this 14 day of May, 1992.

S/
Norman Sepenuk
Of Attorneys for Petitioner

SUPREME COURT OF THE UNITED STATES

SAMUEL E. WALLER *v.* UNITED STATES

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 91-1410. Decided June 1, 1992

The petition for a writ of certiorari is denied.

JUSTICE WHITE, with whom JUSTICE O'CONNOR joins, dissenting.

Title 28 U. S. C. §455(a) provides that "[a]ny justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." This case presents the question whether the cause of apparent partiality or bias must stem from an extrajudicial source. I would grant the petition for writ of certiorari to resolve a recognized split among the Courts of Appeals on this issue.

Petitioner Samuel Waller and his stepfather, Gentry McKinney, were charged with 61 counts of structuring deposits to avoid currency transaction reporting requirements and one count of conspiring to commit those offenses. The District Court granted petitioner's motion to sever his trial from that of McKinney. In connection with that motion, petitioner and the Government agreed that McKinney would be tried by a jury prior to petitioner's trial. Petitioner agreed to waive his right to a jury trial and to have a bench trial using the relevant evidence from McKinney's trial, as supplemented by any evidence adduced relative to petitioner's role in the offense.

The same judge presided at both trials. McKinney was convicted on all counts in September 1989 and sentenced in December 1989. As part of the sentencing record, the judge reviewed an FBI memorandum appended to McKinney's

presentence report. This memo alleged that McKinney and petitioner had been involved in drug trafficking and disclosed the full scope of criminal activity in which the Government suspected petitioner and McKinney were involved. Petitioner was later convicted after his bench trial in April 1990. Prior to his sentencing in January 1991, petitioner received a copy of his presentence report, which also had attached the FBI memorandum. Petitioner discovered that the District Court used the memo in McKinney's sentence and, consequently, that the judge had read all of its prejudicial allegations about petitioner prior to the time he presided at the bench trial.

Petitioner moved for a new trial, alleging that the judge should have disqualified himself, pursuant to 28 U. S. C. §455(a), because of the appearance of bias and partiality created by prior receipt of the FBI memorandum and failure to disclose its existence prior to bench trial. The District Court denied the motion because the prejudicial information about petitioner was not received from an extrajudicial source, *i.e.*, one independent of the prosecution of petitioner and McKinney. The judge acknowledged that the appearance of bias existed, but stated further that he did not believe he was in fact biased, that he either rejected or failed to recall specific allegations from the memo during trial, and that he ignored any inadmissible evidence in adjudicating petitioner's guilt.

Relying on *United States* v. *Monaco*, 852 F. 2d 1143, 1147 (CA9 1988), cert. denied, 488 U. S. 1040 (1989), and *United States* v. *Winston*, 613 F. 2d 221, 223 (CA9 1980), the Ninth Circuit affirmed in an unpublished opinion, holding that "[i]nformation obtained by a judge through judicial duties in relation to one co-defendant . . . cannot serve to disqualify that judge from the subsequent trial of another codefendant." App. to Pet. for Cert. A-4. The appellate court supported its conclusion by noting that the judge read the memo more than five months prior to petitioner's bench trial and had forgotten the significance and the specific allegations of the memo; that a judge is presumed to ignore inadmissible evidence in deciding a case; and that petitioner

agreed the judge could consider evidence from McKinney's trial and was aware the judge would have access to all information from those proceedings. "Given these facts," the Ninth Circuit concluded, "we see no reasonable grounds for questioning [the trial judge's] impartiality because of bias or prejudice." *Id.*, at A-6.

The Ninth Circuit explicitly rejected the First Circuit's contrary approach in *United States* v. *Chantal*, 902 F. 2d 1018 (1990), where the First Circuit emphasized that it "has repeatedly subscribed to what all commentators characterize as the correct view that . . . the source of the asserted bias/prejudice in a §455(a) claim can originate explicitly in judicial proceedings." *Id.*, at 1022. See *Panzardi-Alvarez* v. *United States*, 879 F. 2d 975, 983–984 (CA1 1989); *United States* v. *Kelley*, 712 F. 2d 884, 889–890 (CA1 1983); *United States* v. *Cepeda Penes*, 577 F. 2d 754, 758 (CA1 1978); *United States* v. *Cowden*, 545 F. 2d 257, 265 (CA1 1976), cert. denied, 430 U. S. 909 (1977). The First Circuit has concluded that the language of §455(a) is "automatic, mandatory and self-executing"; that "[i]t did away with the 'duty to sit' doctrine"; and that "[i]t attacks the appearance of bias, not just bias in fact." *Chantal*, 902 F. 2d, at 1023. That the First Circuit would consider appearances of judicial bias and prejudice originating in judicial proceedings conflicts not only with the Ninth Circuit, but also with the Fourth, Fifth, Sixth, and Eleventh Circuits. See *United States* v. *Mitchell*, 886 F. 2d 667, 671 (CA4 1989); *United States* v. *Merkt*, 794 F. 2d 950, 960 (CA5 1986), cert. denied, 480 U. S. 946 (1987); *United States* v. *Sammons*, 918 F. 2d 592, 599 (CA6 1990); *McWhorter* v. *Birmingham*, 906 F. 2d 674, 678 (CA11 1990).

Here, the trial judge stated, "'I do believe that the appearance of the question exists, and I think it is aggravated here by the fact I allowed a waiver of the jury.'" Reply to Brief in Opposition 6 (quoting Transcript of Motions Hearings). The District Court, in line with its precedent in the Ninth Circuit and other Circuits, pretermitted any such consideration upon the conclusion that only

extrajudicial sources can lead to reasonable questions about the judge's impartiality, a rule that the First Circuit rejects.

The statute itself gives no indication regarding the correct resolution of this recurring question. Because the Courts of Appeals have settled into differing interpretations of this statutory recusal provision, I would grant certiorari to resolve the conflict.